IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

AS.No. 94 of 1996()

(AGAINST THE DECREE AND JUDGMENT PASSED IN IA. NO.128/93 IN O.S. NO.30/1974 OF THE COURT OF SUBORDINAGE JUDGE, CHERTHALA.)

APPELLANT: 4TH DEFENDANT

SANKARAN KRISHNAN, THEKKEVELIYIL,
PERUMBALAM KARAYIL MATTATHIBHAGAM VILLAGE.

BY ADV. SRI.V.N.SWAMINATHAN,S.DILEEP

RESPONDENTS: PLAINTIFFS 2 ANF 4 TO 11
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* **1.** **MADHAVAN VELAPPAN, RESIDING AT PADINJARE VELIYIL PERUMBALAM KARA, MATTATHIBHAGAM VILLAGE, CHERTHALA.(DIED)**

2. **RAMAN VISWAMBHARAN, PADINJAREVELIYIL, WYNAD DISTRICT MADAKKUNNU P.O.**

3. **RAMAN VASUMATHI, KUTTATHU VEEDU, EROOR, P.O., MADAMA VILLAGE, KANAYANOOR TALUK.**

4. **RAMAN UNNIKRISHNAN, AJITHA NIVAS, MARADU VILLAGE KANAYANOOR TALUK.**

5. **M.B.JEENA W/O.LATE RAMAN HARIHARAN, MANNUVELI MULAVUKAD P.O. KANAYANOOR TALUK.**

6. **HAJEESH S/O. RAMAN HARIHARAN (MINOR) REP.BY MOTHER 5TH RESPONDENT.**

7. **RAMAN THANKACHAN, PARVATHI NIVAS, MARADU P.O., KANAYANOOR TALUK.**

8. **RAMAN SREEDEVI, KANDAYAKKAPPALLY, THURUTHIBHAGAM MURI NADUVATHU NAGAR P.O. CHERTHALA.**

***9.** **RAMAN SUBHASH, KIZHAKKE NANGANATTU PERUMBALAMP.O., DO VILLAGE.(DIED)**

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ADDL.R10 TO R15 ARE IMPLEADED

10. LAKSHMI, W/O.VELAPPAN, PADINJARE VELIYIL, PERUMBALAM.

11. SOBHANA, D/O.VELAPPAN, KANNAMPALLY VEEDU, THALAYAZHAM P.O., VAIKOM.

12. THANKACHI, D/O.VELAPPAN, MULAKKARA VEEDU, VELLAKOM P.O. VAIKOM.

13. SUJATHA, D/O.VELAPPAN, CHAMANKARI, VELLAKOM P O., VAIKOM.

14. P.V.SANTHOSH, S/O.VELAPPAN , PADINJARE PERUMBALAM P.O. , CHERTHALA.

15. P.V.SAJEEV, S/O.VELAPPAN OF DO. DO.

*** THE LEGAL HEIRS OF THE DECEASED R2 ARE IMPLEADED ADDL.R10 TO R15 VIDE ORDER DT.8.12.04 ON I.A 2961/2004.**

*** IT IS RECORDED THAT R9 EXPIRED AND THEREFORE HIS NAME IS DELETED FROM THE PARTY ARRAY VIDE ORDER DT.21.3.2007 ON MEMO DT.13.3.07 C.F. 1471/2007.**

BY ADV. SRI.ANIL THOMAS - R2 TO R8
SRI.JOHN ABRAHAM, BIJU P. KURIAKOSE - R10 TO 15.

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 01/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.
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A.S. No. 94 OF 1996

Dated this the 1st day of June, 2007
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JUDGMENT

The 4th defendant in O.S.30/1974 on the file of Sub Court, Cherthala, is the appellant. The appeal is filed against a final decree passed by the court below in a suit for partition. The suit was for partition of a number of items. The trial court passed a preliminary decree allotting 1/3 share in item Nos. 1,2,11 and 12 and ¼ share in items Nos. 3,5 and 6 and ½ share in item Nos. 8 and 9 to the plaintiffs. Subsequently a commission was appointed to effect partition by meets and bounds. The commissioner filed a report and plan. The appellant filed objection stating that the direction of the trial court was to prepare a plan with the help of a Taluk surveyor but the commissioner measured the property with the help of a village officer. It was also contended that the measurements of No. 3 given in the report was not correct and the property was not properly measured and identified. It was further contended that the property in the possession of the strangers were also included in the plan. The quantum or share of profits fixed was also challenged. But the appellant did not go to the box or examine the commissioner. The trial court accepted the plan and reports and decreed the suit. Challenging

that decree this appeal is filed.

2. The challenge in this appeal is regarding the item No.3 only. The decree passed in respect of all other items have become final and conclusive.

3. The counsel for the appellant has argued that partition was affected in very inconvenient manner. It is argued that for allotting the property to the plaintiffs the commissioner divided item No.3 into three plots and left a small bit of property on the south which cannot be enjoyed conveniently by anybody. It is also contended that in respect of a portion of item No.3 two persons obtained certificates of purchase from the competent Land Tribunal but partition was affected as if those properties were also available. It is also contended that there is violation of the direction issued by court, and on that ground alone, the commission report is liable to be set aside. The learned counsel for the respondents submitted that even if initially there was any direction to measure out property with the help of Taluk surveyor, the commissioner filed a memo stating that he may be permitted to execute the work with the help of a village officer and the trial court allowed the same. It is argued by the counsel for the respondent that the appellant did not challenge that order and as such he cannot be allowed to raise that contention in this appeal. The counsel for the

appellant has argued that there is no bar for raising that contention in this appeal filed against the final decree. Learned counsel for the appellant relied on the decisions reported in *Damodaran vs. Karimba Plantations Co. Ltd. and others* (1959 KLJ 372) and *K.P.Narayanan Nambiar and Others vs. Raman Chettiyar and Others* (1969 KLT 449) and argued that if there is violation of a direction issued by the court the report is to be set aside. It is true that perusal of plan shows that item No. 3 of plaint schedule property was divided into three plots and a small plot left on the south of the plot of 25 cents property allotted to the plaintiffs. Whether that bit of land left out is a portion of the suit property or not and to whom it was allotted are not clear. Considering all aspects of the matter I am of the view that an opportunity can be granted to the appellant to substantiate his objection to the commission report provided the appellant pays or deposit before this court a cost of Rs.1,500/- to the plaintiffs/respondents. If the condition is complied with an opportunity should be given to the appellant to substantiate objections filed to the commission report. For that purpose the case has to go back. But I make it clear that the objection can be considered only in respect of the item No.3 as the decree in respect of the other items has become final and conclusive.

In the result the appeal is allowed in part. The decree so far as relate to item no.3 will stand set aside and remanded back to the trial court for fresh disposal in accordance with law on condition that appellants pays or deposits before this court Rs.1,500/- as cost to the respondents/plaintiffs. If the condition is complied with the case shall be remanded for the purpose of giving an opportunity to the appellant to substantiate his objection filed to the report and plan so far as it relates to plaint item No.3 alone. In case the court below is of the opinion that the report and plan is to be remitted to the commissioner it is open to the plaintiffs to file an application for a direction to the commissioner to measure out the plaint item No. 3 with the assistance of village officer. If such a request is made the same shall be considered by the trial court and appropriate orders passed. If the condition is complied with and the case is remanded, the trail court shall post the case on a priority basis and dispose of the same in accordance with law as expeditiously as possible at any rate within three months from the date of receipt of a copy of this judgment. If the condition to pay the cost is not complied with, the appeal will stand dismissed with costs.

K.PADMANABHAN NAIR
JUDGE.

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